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No. 98-15730

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF CALIFORNIA; ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA, *Petitioners,*

v.

DONALD WASHINGTON, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

California prohibits review of claims on state habeas which should have been raised on direct appeal (In re Dixon, 41 Cal.2d 756, 759, 264 P.2d 513 (1953)), with a state-law exception for a "clear and fundamental constitutional violation striking at the heart of the trial process." In re Harris, 5 Cal.4th 813, 836, 855 P.2d 391 (1993). The adequate and independent state ground doctrine, which precludes federal habeas courts from considering procedurally defaulted claims, "is grounded in concerns of comity and federalism." Coleman v. Thompson, 501 U.S. 722, 730 (1991).

1. Did the Ninth Circuit violate comity by holding that the Dixon rule was not independent of federal law based on its finding that the California Supreme Court acknowledged in In re Robbins, 18 Cal.4th 770, 814, n. 34, 959 P.2d 311 (1998), that in determining whether to apply the state-law fundamental-error exception for a Dixon default, the state court necessarily decided the merits of federal claims, despite the state court's assertion in Robbins that "in no event is merit review invariable or obligatory when a procedural bar applies?" Robbins, 18 Cal.4th at 778, n. 1.

2. Did the Ninth Circuit err in concluding that the application of a fundamental-error exception for a state procedural bar renders the bar dependent on federal law, thus contradicting dicta from this Court and creating an intercircuit conflict requiring resolution by this Court?

3. Did the Ninth Circuit violate O'Sullivan v. Boerckel, 526 U.S. 838 (1999), by holding that a prisoner who fails to present his claims on direct appeal does not default those claims in federal court if he later files a state habeas petition in hopes of obtaining discretionary collateral review of the claims?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the People of the State of California and the Attorney General of the State of California, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on April 14, 2000, appears at Appendix A to the petition and is reported at 208 F.3d 832 (9th Cir. 2000). The unreported opinion of the district court appears at Appendix B.

The California Supreme Court's order denying respondent's petition for writ of habeas corpus on the procedural ground of failure to raise the claims on appeal appears at Appendix C. The California Court of Appeal's unreported opinion affirming respondent's conviction can be found at Appendix D.

JURISDICTION

The Court of Appeals for the Ninth Circuit issued its opinion on April 14, 2000. Appendix A. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Washington was convicted of battery on a correctional officer (Cal. Pen. Code, § 4501.5), resisting a peace officer (Cal. Pen. Code, § 148), and assault by force likely to produce great bodily injury (Cal. Pen. Code, § 245, subd. (a)(1)). The trial court found two prior serious felony conviction allegations true. (Cal. Pen. Code, § 667). Washington filed his opening brief on direct appeal in January, 1994. The First Appellate District of the California Court of Appeal affirmed the judgment on August 19, 1994. Appendix D. Washington did not appeal to the California Supreme Court.

On March 31, 1997, Washington filed a petition for writ of habeas corpus in the California Supreme Court raising the claims he subsequently presented in his federal collateral proceeding. The California Supreme Court denied the

petition on May 28, 1997, with citations to In re Swain, 34 Cal.2d 300, 304 (1949) and In re Dixon, 41 Cal.2d 756, 759 (19 53). Appendix C.

In Dixon, the California Supreme Court held that the "general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." Dixon, 41 Cal.2d at 759. In In re Harris, 5 Cal.4th 813, 855 P.2d 391 (1993), the California Supreme Court clarified the legal standard for the four exceptions it recognizes to forgive a Dixon default, the first for a "clear and fundamental constitutional violation striking at the heart of the trial process." Harris, 5 Cal.4th at 829-36.

Washington filed a petition for writ of habeas corpus in the United States District Court on June 20, 1997. 28 U.S.C. § 2254(a). The federal petition presented claims: (1) the prosecutor's reference to Washington's post-Miranda silence as evidence of sanity violated due process, and (2) Washington's right to a fair trial was violated when he appeared before the jury in retraints, consisting of a waistchain, manacles, and leg irons.

In an order filed on March 16, 1998, the district court dismissed the petition on the ground that Washington had defaulted both claims on procedural grounds in the California courts by failing to present them on direct appeal, as evidenced by the California Supreme Court's citation of Dixon in denying the state habeas petition, and by filing an untimely petition as evidenced by the California Supreme Court's citation to Swain. Appendix B.

Washington filed a notice of appeal. The district court denied a certificate of probable cause; the court of appeals granted one. While Washington's appeal was pending in the Ninth Circuit, the California Supreme Court issued In re Robbins, 18 Cal.4th 770, 959 P.2d 311 (1998), which among

other things, explains the operation of the "timeliness" bar. Robbins states that when the court imposes the Dixon bar for claims that should have been raised on appeal, it intends to signify that none of the four state-law exceptions to that bar apply, including the exception for a "clear and fundamental constitutional violation striking at the heart of the trial process." Robbins, 18 Cal.4th at 814, n. 34. Robbins also states that "[i]n no event is merit review invariable or obligatory when a procedural bar applies." Id. at 778, n. 1.

On April 14, 2000, the Ninth Circuit filed its decision. Citing its own recent opinion in Park v. California, 202 F.3d 1146 (9th Cir. 2000), Appendix A,[1]/ the court reversed the district court's order dismissing the petition as procedurally defaulted in state court for failure to raise the claims on direct appeal. The court held, as it had in Park, that California's Dixon bar was not independent of federal law, and thus could not bar federal habeas review of federal constitutional claims. The court reasoned, as it did in Park, that the California Supreme Court had acknowledged in Robbins, that prior to the date of that decision on August 3, 1998, California appellate courts "'necessarily addressed fundamental constitutional claims when applying the Dixon rule.'" Washington, at 334; quoting Park, at 1152. Based upon this premise, the federal court held that, the California Supreme Court's denial of the state petition for failure to raise the claims on direct appeal was "not independent of federal law and does not preclude federal habeas review." Id.

REASONS FOR GRANTING THE WRIT

The issues presented here are already before this Court in our Petition For Writ of Certiorari in California v. Park (No. 99-1971).

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1. Petitioners have filed a petition for writ of certorari in California v. Park (No. 99-1971).

Federal courts are barred from habeas corpus review of a state prisoner's federal claims if he defaulted them in state court under an independent and adequate state rule of procedure. Coleman v. Thompson, 501 U.S. 722, 750 (1991). A "habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." Id. at 732.

Continuing its systematic dismantling of California's procedural defaults as bars to federal collateral review, the Ninth Circuit has held that California's most basic appellate bar is not independent of federal law. Certiorari should be granted for three separate reasons.

First, the Ninth Circuit's holding is so broadly stated that it jeopardizes all California state procedural bars imposed in cases prior to August 3, 1998, including more than 500 unresolved capital cases, in which the California Supreme Court frequently disposes of successive, abusive and stale claims on grounds of procedural default.[2]/ The opinion is also a patent affront to comity.

In common with most jurisdictions, California prohibits collateral review on habeas corpus of claims that could have been raised on direct appeal. In re Dixon, 41 Cal.2d at 759. This is a nearly universal procedural rule, one which this Court has repeatedly upheld. Murray v. Carrier, 477 U.S. 478, 489-91 (1986); Smith v. Murray, 477 U.S. 527, 533-35 (1986); Reed v. Ross, 468 U.S. 1, 10 (1984).

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2. The jeopardy is not speculative. The decision in this case is spreading rapidly, and its rationale is being used in published cases to invalidate other bars. See Park v. California; Havey v. Hubbard, 2000 U.S. App. LEXIS 8871 (9th Cir. May 1, 2000); La Crosse v. Kernan, 211 F.3d 468 (9th Cir. 2000) (applied to untimeliness bar); Jackson v. Calderon, 2000 U.S. App. LEXIS 9049 (9th Cir. May 8, 2000) (applied to untimeliness bar in capital case).

In this case, the Ninth Circuit held, as it did in Park, that the Dixon rule is not independent of federal law based upon its interpretation of statements in In re Robbins, 18 Cal.4th at 814, n. 34. The Ninth Circuit applied its statement in Park, that the "California Supreme Court recently stated [in Robbins] that prior to 1998 it necessarily addressed fundamental constitutional claims when applying the Dixon rule." Park, at 1152. The Ninth Circuit again noted the California Supreme Court's statement that its imposition of the Dixon bar, means "none of the four exceptions" to the default rule apply. One of those exceptions is the familiar "fundamental constitutional rights" exception. The Ninth Circuit inferred that, in assessing whether any of the claims stated an exception to the Dixon bar, the state court necessarily reached and decided the merits of all federal claims.

The result of this interpretation of Robbins is perverse. It transforms a commonplace, limited, discretionary state procedural rule into a mandatory, plenary merits review rule for all alleged federal constitutional errors in all cases.

The Ninth Circuit's holding is profoundly mistaken. It is based on a fundamental misinterpretation of California state law, as well as on unwarranted and inaccurate speculation about the internal practices of the California Supreme Court. This speculation is based upon nothing more than the Ninth Circuit's misinterpretation of a passage about the elements of a legal standard modified in Robbins. The announcement of a modified element of a fundamental constitutional error exception, without more, cannot reasonably be viewed as a statement of historical practice in thousands of California habeas corpus cases.

The Ninth Circuit's misinterpretation of California state law is made completely untenable by its refusal to certify the underlying state-law questions to the California Supreme Court for an authoritative statement of that Court's practice. Instead of turning to the state court for the proper interpretation of state law, the Ninth Circuit insists on its own

tendentious and erroneous version of that law. This, too, offends comity.

Second, the opinion in this case is premised upon a basic misapprehension of the operation of traditional state plain/fundamental constitutional error exceptions. Such reviews are simply not interchangeable with a mandatory constitutional merits review. In committing this error, the Ninth Circuit disregarded important dicta from this Court, and created an inter-circuit conflict with most other circuit courts that have considered the validity of state law plain/fundamental error rules. See e.g., Simpson v. Matesanz, 175 F.3d 200, 209 (1st Cir. 1999). No other circuit has made this rudimentary error, and the conflict created by this decision requires resolution by this Court.

Finally, the Ninth Circuit's decision violates the rule of O'Sullivan v. Boerckel, 526 U.S. 838 (1999), which holds that a prisoner who fails to present his claims in a timely petition for discretionary review to a state court of last resort has not properly presented his claims through the normal established appellate process and therefore defaults his claims as a matter of federal law. Id. at 845, 848.

The Ninth Circuit acknowledged the O'Sullivan rule in Park, but found it inapplicable by concluding that the O'Sullivan federal bar is lifted when a state court imposes its bar for failure to raise a claim on appeal. The Ninth Circuit held that since California "provided Park a second chance" by giving him the limited opportunity to obtain forgiveness of the state bar, and Park "took advantage of it," the O'Sullivan federal bar was lifted. Park, 202 F.3d at 1153-54. This interpretation turns O'Sullivan on its head.

Under O'Sullivan, Washington's failure to avail himself of his normal appellate remedy, in and of itself, meant that he failed to properly exhaust his state remedies, and his claims are now procedurally barred as a matter of federal, not merely state, law. O'Sullivan, 528 U.S. at 848. Bypassing the normal appellate review system, plain and simple, defaults the

claim for federal collateral review purposes, regardless of whether the prisoner later asks the state court to forgive his default by finding an extraordinary exception which might warrant collateral review. Certiorari should also be granted to correct this basic misapplication of O'Sullivan.

ARGUMENT

I.

THE NINTH CIRCUIT ERRED IN HOLDING THAT THE CALIFORNIA SUPREME COURT ACKNOWLEDGED THAT IN APPLYING ITS FUNDAMENTAL ERROR EXCEPTION FOR PROCEDURAL BARS, IT NECESSARILY REACHED AND DETERMINED ALL UNDERLYING FEDERAL CONSTITUTIONAL CLAIMS

The decision in this case and Park, upon which the court relied, is based upon an egregious misstatement of California state law. The Ninth Circuit's account in Park of the history of California's procedural bars is rife with errors, and lacks the basic comity due the state court. This decision is only the most recent manifestation of Ninth Circuit's persistent antagonism to California's procedural bars. For several years, the Ninth Circuit has repeatedly invalidated California's basic procedural bars on the ground that they were inadequate to bar

federal review.[3]/ In Park, the Ninth Circuit, for the first time, found a crucial California bar dependent on federal law.

California, like most jurisdictions, requires defendants to raise claims on direct appeal when possible, and bars collateral review of those claims on habeas when they have not been presented on appeal. In re Dixon, 41 Cal.2d at 759. In 1993, the California Supreme Court reviewed and explained its practice concerning imposition of the Dixon bar, and other bars, in In re Harris, 5 Cal.4th 813, 855 P.2d 391 and In re Clark, 5 Cal.4th 750, 855 P.2d 729 (1993). In Harris, the California Supreme Court defined the operation of an exception to the Dixon bar which involved a "clear and fundamental constitutional violation striking at the heart of the trial process." Harris, 5 Cal.4th at 836.

While the instant case was pending on appeal in the Ninth Circuit, the California Supreme Court issued its opinion in Robbins, which clarified the operation of the state-law "timeliness" bar. The Supreme Court in Robbins also included several brief comments about its procedures in applying other procedural bars, including the Dixon rule, which bars a claim that should have been raised on appeal.

In Park, the Ninth Circuit seized on several of these comments in Robbins to hold that the California Supreme Court had made an

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3. The Ninth Circuit has found California's timeliness, successive-petition, and Dixon bars inadequate to bar federal review on many occasions. See Fields v. Calderon, 125 F.3d 757, 765 (9th Cir. 1997) (Dixon bar inadequate); Calderon v. U.S. District Court (Hayes), 103 F.3d 72, 75 (9th Cir. 1996) Dixon and timeliness bars inadequate); Calderon v. U. S. District Court (Bean), 96 F.3d 1126, 1128-31 (9th Cir. 1996) (timeliness bar inadequate); Morales v. Calderon, 85 F.3d 1387, 1388 (9th Cir. 1996) (timeliness bar inadequate); Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994) (successive-petition bar inadequate).

> acknowledgment that the [fundamental] constitutional error exception encompassed consideration by the court of the merits of federal constitutional questions, [and that] the California Supreme Court necessarily made an antecedent ruling on federal law before applying the Dixon bar to any federal constitutional claims raised in Park's state habeas petition. That court did so by concluding that no fundamental federal constitutional error had occurred.

Park, at 1153. In other words, the Ninth Circuit finds that for the 45 years after Dixon in 1953 and before Robbins in 1998, the California Supreme Court engaged in the absurdly self-defeating practice of requiring itself and other California courts to reach and decide the merits of a federal constitutional claim in order to determine whether the claim should be rejected summarily without reaching the merits. Nothing in Robbins, or in the history of California's procedural bar law, justifies ascribing such a purpose to the California Supreme Court. There is no support in Robbins for the sweeping conclusion that California's fundamental-constitutional-error exception under Dixon or Harris requires plenary merits review of all constitutional claims in all cases.

On the contrary, the Robbins decision itself emphatically refutes the Ninth Circuit's assumption. In Robbins, the California Supreme Court described the manner in which it had historically conducted a review for procedural bar, before Robbins. The Court stated that,

> although our orders frequently address the merits when procedural bars apply, commonly they do not. Of the approximately 1,500 noncapital habeas corpus petitions disposed of annually by this court, a substantial proportion of our denial orders, representing hundreds of claims, typically rests solely on procedural

> grounds. In capital habeas corpus matters, although our orders frequently resolve claims both on procedural grounds and on the merits, we have on occasion denied claims solely on procedural grounds. [Citations.] In no event is merit review invariable or obligatory when a procedural bar applies.

Robbins, 18 Cal.4th at 778, n. 1, emphasis added. In this passage, the California Supreme Court explains what it does not do, and has not done, when it reviews a state habeas petition to determine whether to impose a procedural bar. It does not conduct an "invariable or obligatory" merits review. This is a statement of historical practice, not the announcement of a new, prospective procedure. Remarkably, the Ninth Circuit's decision ignores this explicit statement and concludes that the California Supreme Court states just the opposite in Robbins.

The Attorney General quoted and relied upon this passage in his petitions for rehearing filed in Park. The court of appeals simply ignored the point. By refusing to deal with this unambiguous statement, the Ninth Circuit lost sight of one of the most important limitations on a federal court reviewing state court actions: "the views of the State's highest court with respect to state law are binding on the federal courts." Wainwright v. Goode, 464 U.S. 78, 84 (1983). The Ninth Circuit's rendition of state law is not only inimical to the state's interests in preserving its convictions from stale and piecemeal claims. It also conspicuously contradicts the California Supreme Court's own interpretation of state law.

The underlying premise of the Ninth Circuit's remarkable conclusion comes from the following passage in Robbins, which considers the application of the exception for "error of constitutional magnitude" in Clark:

> Although the [first] exception is phrased in terms of error of constitutional magnitude -- which obviously may include federal constitutional claims -- in applying this

> exception and finding it inapplicable we shall, in this case and in the future, adopt the following approach as our standard practice: We need not and will not decide whether the alleged error actually constitutes a federal constitutional violation. Instead, we shall assume, for the purpose of addressing the procedural issue, that a federal constitutional error is stated, and we shall find the exception inapposite if, based upon our application of state law, it cannot be said that the asserted error "led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner." [Citation.]

Robbins, 18 Cal.4th 811-12.

Nothing in this passage "acknowledges" that a review by a California state court of a state habeas petition prior to August 3, 1998, which involved checking for exceptions to state procedural bars, "encompassed consideration by the court of the merits of federal constitutional questions. . . ." Park, 202 F.3d at 1153. Nothing in this passage says that, before August 3, 1998, the California Supreme Court reached and decided the merits of every federal constitutional claim when it reviewed state habeas petitions. Nothing in this passage even hints that the California Supreme Court actually reached the merits in any previous case, or in any significant number of cases under Dixon or Harris or Clark, let alone in Park's case under Dixon or Harris. In fact, in the footnote attached to this passage, the court used the present tense to explain that "whenever we apply the first three Clark exceptions [including the fundamental constitutional violation exception], we do so exclusively by reference to state law." Robbins, 18 Cal.4th at 811, n. 32, emphasis added. This statement means that, at least since Clark and Harris, the first three California state-law exceptions have been applied with reference to state law. The passage thus

completely undercuts the Ninth Circuit's interpretation of Robbins.

In Coleman v. Thompson, this Court cautioned that federal courts reviewing fundamental error exceptions to procedural bars should act only on the basis of explicit state-court policies. The Court noted that the Virginia Supreme Court had, on one occasion, "reviewed the merits of constitutional claims before deciding whether to dismiss an appeal as untimely." Coleman, 501 U.S. at 742. The Court refused to draw an inference against the overall state practice from that one case:

> There is no evidence other than O'Brien [v. Socony Mobil Oil Co., 207 Va.707, 152 S.E.2d 278 (1967)] that the Virginia Supreme Court has ever conducted such a review, and O'Brien explicitly declined to announce such a practice. We decline Coleman's invitation to announce such a practice for that court.

Id. at 743-44, emphasis added. In the absence of a clear statement from the California Supreme Court that, prior to Robbins, California courts conducted a merits review of all federal constitutional claims before deciding whether to impose a state procedural bar, the Ninth Circuit should have given heed to this Court's admonition to decline to announce procedural rules for the state court.

Perhaps most remarkably, the court of appeals in Park reached its result despite the ready availability of the certification procedure, which would resolve the underlying state-law question in the state supreme court, where it belongs. Respondent's motion to certify two questions to the California Supreme Court was summarily denied in the Ninth Circuit's second opinion. Park, 202 F.3d at 1148, n. 1. In denying certification, the Ninth Circuit has chosen to adhere to its own mistaken rendition of California's historical procedural bar practice, shunning the definitive account so readily available from the state Supreme Court.

Respondent twice urged the Ninth Circuit in Park to certify the following question to the California Supreme Court:

> At any time, has California law obligated a state court under In re Dixon, [citation], or In re Harris, [citation], to reach and determine the merits of a federal constitutional claim before imposing a bar? See Petition for Certiorari in California v. Park, No. 99-1971 at 14-5.

The Ninth Circuit's entire analysis hinges on its own mistaken answer to this question. This Court should correct that mistake, and avoid the "friction-generating error" brought about by the Ninth Circuit's speculation. Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1997). The answer to the question is, in every way, a state-law matter, and it should come from the California Supreme Court, not from the Ninth Circuit.

This Court has strongly endorsed the practice of certifying questions of state law to state courts for their authoritative answers. In Fiore v. White, 120 S. Ct. 469, 473 (1999), this Court certified a question to the Pennsylvania Supreme Court because "the answer to this question will help determine the proper state-law predicate for our determination of the federal constitutional questions raised in this case." Certification is even more urgently required here, where the Ninth Circuit has indulged in a construction of California state law that threatens to set at naught all remaining state procedural bars imposed before August 3, 1998.

In Arizonans for Official English, this Court held that the district court and the Ninth Circuit erred in refusing to certify questions of state law to the Arizona Supreme Court. This Court cautioned that the certification procedure was designed "to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues. . . ." Id. 520 U.S. at 75. The certification process replaces gratuitous speculation and avoids the risk that the federal tribunal will engage in such needlessly abrasive error with a system designed

for "reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response" to state-law questions. Id. at 75-76. Granting the state's certification motions would have "save[d] 'time, energy, and resources and help[ed] build a cooperative judicial federalism.'" Id. at 77. Clearly, then, "the certification requests merited more respectful consideration than they received in the proceedings below." Id. at 78.

In Park, the Ninth Circuit issued an opinion which is breathtaking in its sweep, and ominous in its implications for the remainder of all California's procedural bars imposed before August 3, 1998. There is simply no support for the court of appeals' finding that the plain/fundamental constitutional error exception to the Dixon default rule requires plenary merits review in all cases. On the contrary, there are statements in Robbins itself which completely refute the Ninth Circuit's conclusion. At a bare minimum, however, those statements should have prompted the Ninth Circuit to certify the issue to the California Supreme Court for its account of what it does, and has done, when applying its own exceptions to its own procedural bars. Anything less is an affront to comity.

II.

THE NINTH CIRCUIT'S HOLDING THAT THE APPLICATION OF A FUNDAMENTAL ERROR EXCEPTION FOR A STATE PROCEDURAL BAR RENDERS THE BAR DEPENDENT ON FEDERAL LAW CONFLICTS WITH TWO DECISIONS FROM THIS COURT AND WITH OTHER CIRCUIT DECISIONS

The Ninth Circuit's holding that a state plain/fundamental constitutional error exception is invalid because it is interwoven with federal law sharply conflicts with dicta from two decisions of this Court, and with decisions from many other circuit courts. Those decisions all grasp the distinction between the operation of the fundamental or plain-error exception for procedural bars and a plenary merits review. The Ninth Circuit does not. This conflict merits review on certiorari.

Most federal courts have affirmed the validity of fundamental-error exceptions to state procedural bars. Indeed, this Court has drawn a clear distinction between a review for fundamental error and review for federal constitutional error. In Sochor v. Florida, 504 U.S. 527 (1992), this Court found the suggestion that a review for fundamental error regarding a state bar implied a rejection of a federal constitutional claim an "Olympic stretch." Id. at 534 n. 9. Even more to the point, in Engle v. Isaac, 456 U.S. 107 (1981), this Court approved Ohio's plain-error rule, which excuses procedural defaults "only in 'exceptional circumstances,' such as where, 'but for the error,

the outcome of the trial clearly would have been otherwise.' [Citation.]" Id. at 125 n. 27. The Court explained that if Ohio had forgiven the default and

> exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review. [Citations.] Our opinions, however, make clear that the States have the primary responsibility to interpret and apply their plain-error rules. Certainly we should not rely upon a state plain-error rule when the State has refused to apply that rule to the very sort of claim at issue.

Id. at 135 n. 44. In this case, the Ninth Circuit has simply lost sight of this important limitation on the reach of a federal habeas court, assuming for itself the responsibility and authority to "interpret and apply" California's procedural bar exceptions. On this ground alone, the Ninth Circuit's decision should be reversed.

Most of the federal circuits which have addressed this issue concur with this Court's remarks in Sochor and Engle. That is, most federal courts understand that a review for "fundamental constitutional error," especially as a possible exception to a state procedural bar, is simply not a merits review.

In many states, including California, the state court applying a procedural bar has discretion to address a defaulted federal constitutional issue "only to determine whether it ought to disregard its waiver rule on the ground that the federal constitutional issue constitutes 'fundamental error.'" Willis v. Aiken, 8 F.3d 556, 562 (7th Cir. 1993). In Willis, the court expressed the widespread understanding that "fundamental error" is "a term of art employed on a fact-specific basis for the purpose of determining whether to excuse noncompliance" with a procedural default. Id. at 566. Citing the Tenth Circuit decision in Gutierrez v. Moriarity, 922 F.2d 1464, 1469 (10th Cir. 1991), the Willis court explained that

characterizing the error as "fundamental" "appears to be far more a function of the error's relationship to the policy concerns animating the state's [procedural bar] than of federal constitutional policy concerns." Willis, 8 F.3d at 567. Accordingly, state law mandates "review on the merits of fundamental rights claims only when the denial of the right 'gives rise to a question of fundamental error as defined by state law.' [Citation]." Id.

Judge Posner explained this point even more directly. In Neal v. Gramley, 99 F.3d 841 (7th Cir. 1996), he noted that Illinois, like California and many other states,

> provides a safety valve for situations in which enforcing a procedural default would mask a plain error. [Citations.] To decide whether an error is plain requires consideration of the merits--but only so far as may be required to determine that issue. It does not open up the merits any wider for consideration by the federal court. [Citations.] It is the same with the closely related Illinois rule relating to fundamental deficiencies in the postconviction process. The determination of deficiency may require a glance at the merits; it does not open up the merits to plenary consideration by the federal court.

Id. at 844. The "fact that the state court in the second round of post-conviction proceedings touched on the merits of Neal's federal constitutional claim does not permit us to disregard the default." Id. at 843. In Park, the Ninth Circuit has obliterated the state "safety valve," and has confused a simple "glance," merely "touching" on allegations of constitutional error, with a comprehensive merits determination.

Most of the federal appellate courts to have considered this issue have avoided the Ninth Circuit's conceptual lapse. See Wilson v. Moore, 178 F.3d 266, 276 (4th Cir. 1999); Simpson v. Matesanz, 175 F.3d at 205; Tarver v.

Hopper, 169 F.3d 710, 712 (11th Cir. 1999); Mu'Min v. Pruett, 125 F.3d 192, 197 (4th Cir. 1997); Andrews v. Deland, 943 F.2d 1162, 1189 (10th Cir. 1991). The reasoning behind the conclusion in these cases was well articulated in McCown v. Callahan, 726 F.2d 1 (1st Cir. 1984). There, the First Circuit concluded that if federal habeas courts were inclined to find that state fundamental error review undermined state procedural rules,

> the state either would have to convert what is often a speedy reviewing task into a full scale detailed examination of federal law or it would have to abandon "miscarriage of justice" review altogether. The latter alternative seems highly undesirable. The former conflicts with the theory of Wainwright [v. Sykes, 433 U.S. 72 (1977)]. That is to say, a state's efforts to stop gross miscarriages of justice should not suddenly force it to grapple with complex federal issues that its procedural rules would otherwise lawfully bar.

Id., 726 F.2d at 3-4.

In its determination to invalidate California procedural bars altogether, the Ninth Circuit lost sight of these salutary practical considerations. California's default review is identical in its operation to the plain/fundamental error review in most states with traditional procedural bars. That review is not the same as federal constitutional merits review. For the reasons so strongly articulated by the other circuits, California's Dixon/Harris bar is independent of federal law.

There is no doubt that California has traditionally defined its fundamental error review as a state-law process. In the seminal case of In re Winchester, 53 Cal.2d 528, 348 P.2d 904 (1960), the California Supreme Court explained that, for purposes of ascertaining which claims may be heard in habeas, exceptions are defined "as a miscarriage of justice within the meaning of that phrase as used in section 4 1/2,

article VI, of the Constitution of this state." Id. at 531, emphasis added. In Harris, the court observed that "not all alleged constitutional defects warrant the opportunity to relitigate the issue on habeas corpus." Harris, 5 Cal.4th at 830.

Most crucially, however, in Robbins, the case the Ninth Circuit found dispositive, the California Supreme Court noted that, "[i]n no event is merit review invariable or obligatory when a procedural bar applies." Robbins, 18 Cal.4th at 778 n. 1. The Ninth Circuit erred when it failed to defer to the California Supreme Court's interpretation of state law. In particular, the Ninth Circuit violated comity by refusing to defer to the California Supreme Court's statements that fundamental error review is not "mandatory," does not confine itself to federal constitutional error, and does not even consider every allegation of federal constitutional error. Wainwright v. Goode, 464 U.S. at 84. Since California's default review is not the same as federal constitutional merits review, its Dixon bar is independent of federal law. Certiorari should be granted to correct the Ninth Circuit's aberrant and unsound interpretation of fundamental error review, and to resolve the conflict it creates with other circuits.

III.

THE NINTH CIRCUIT VIOLATED O'SULLIVAN V. BOERCKEL BY FINDING THAT THE FILING OF THE STATE HABEAS PETITION LIFTED THE BAR TO FEDERAL COURT REVIEW

The Ninth Circuit's decision also violates the rule of O'Sullivan v. Boerckel, in which this Court held that, as a matter of comity, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by

invoking one complete round of the State's established appellate review process." Id., 526 U.S. at 845. There is no dispute in this case that Washington did not afford the California courts that one complete round of appellate review. Under O'Sullivan, where state law has "an established, normal appellate review procedure" (id., at 845), it does not matter whether a state prisoner, after forgoing that procedure, might seek to obtain a merits review on collateral review by attempting to establish a fundamental error exception to the state's procedural rule. Under O'Sullivan, Washington's failure to abide by California's Dixon rule requiring appellate presentation of claims, without more, means that he failed to properly exhaust his state remedies, and his claims are now procedurally barred as a matter of federal law. O'Sullivan, at 845-47.

In O'Sullivan, this Court re-emphasized the inseparability of the procedural default doctrine and the exhaustion rule, explaining that vigilant enforcement of a state's procedural default rules is necessary to protect the integrity of the federal exhaustion requirement. Id. at 848. More recently, in Edwards v. Carpenter, 120 S. Ct. 1587, 2000 U.S. LEXIS 2992, *13-14 (2000), this Court reiterated its long-standing policy that the purposes of the exhaustion requirement would be frustrated

> were we to allow federal review to a prisoner who had presented his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it. In such circumstances, though the prisoner would have "concededly exhausted his state remedies," it could hardly be said that, as comity and federalism require, the State had been given a "fair 'opportunity to pass upon [his claims].'" [Citation.]

Id., 2000 U.S. LEXIS 2992, at *14. In this sense Washington's failure to abide by California's Dixon rule is the failure of fair presentation described in O'Sullivan and Edwards.

The Ninth Circuit attempted to circumvent O'Sullivan by holding in Park that "it appears as a matter of federal law that Park escaped the inchoate federal habeas consequences of his failure" to exhaust his appellate remedies by filing a state habeas petition. Park, 202 F.3d at 1153. The Ninth Circuit relied on Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991), for the proposition that if "the last state court to be presented with a federal claim reaches the merits, it removes any bar to federal court review that might otherwise have been available." The Ninth Circuit concluded that, although Park had no right to a review of his claims, he did have a right to raise his claims, and that is all that § 2254(c) requires. Park, 202 F.3d at 1153-54. This analysis is wrong in two respects.

First, the Ninth Circuit's reliance on Nunnemaker is entirely circular, since it depends on the fallacious premise that the California Supreme Court necessarily reached the merits of Park's habeas petition. Second, and even more importantly, the Ninth Circuit misapprehends the scope of the O'Sullivan bar.

O'Sullivan describes a federal bar imposed upon a finding that the prisoner has not properly presented an appellate claim. The determination of whether to impose that bar does not depend on the complex questions of independence and adequacy, or the "plain statement" rule of Harris v. Reed, 489 U.S. 255, 269-70 (1989). On the contrary, as this Court explained in Coleman, such rules do

> not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the

> last state court to which the petitioner actually presented his claims. See Harris v. Reed, 478 U.S. 255, 269-270, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989)(O'CONNOR, J., concurring); Teague v. Lane, 489 U.S. 288, 297-298, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989).

Coleman, 501 U.S. at 735 n. 1, emphasis added. That federal bar goes into effect when the prisoner fails to exhaust his available appellate remedy, as, in this case, when he fails to present his claims on direct appeal. It is not lifted when he seeks the chance for a discretionary collateral hearing on the basis of a state-law exception to a state procedural rule.

This case is even stronger than the situation defined in O'Sullivan. Here, the federal court was not asked to anticipate or predict what the state court might do, since the California Supreme Court has already unambiguously held by citing Dixon that Washington defaulted his claims by failing to avail himself of his normal, established appellate remedy.

Under O'Sullivan, Washington's claims are unexhausted and therefore procedurally barred. When he failed to present those claims on appeal, and certainly when he was later barred from doing so on habeas by an explicit order from the California Supreme Court, Washington reached the dead end described in O'Sullivan. For this reason, the Ninth Circuit erred by interpreting O'Sullivan to permit the lifting of the federal bar when a federal habeas petitioner seeks a second chance to raise his claims by attempting to qualify for a state-law exception to forgive his default.

IV.

THE NINTH CIRCUIT ERRED BY SUBJECTING CALIFORNIA'S PROCEDURAL RULES TO A MORE STRINGENT STANDARD THAN IT APPLIES TO THE INVOCATION OF A PARALLEL FEDERAL PROCEDURAL DEFAULT RULE

In Coleman, adverting to its own settled acceptance of the vital interest served by federal procedural bars, this Court plainly stated that a state's procedural bars were entitled to the same level of deference, in order to "eliminate inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own." Coleman, 501 U.S. at 751. The Court has repeatedly insisted that there is "'no reason . . . to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.'" Francis v. Henderson, 425 U.S. 536, 542 (1976), quoting Kaufman v. United States, 394 U.S. 217, 228 (1969).

In Reed v. Farley, 512 U.S. 339 (1994), the Court spoke plainly of the need for even-handed treatment of state and federal procedural rules: "We see no reason to afford habeas review to a state prisoner . . . who let a time clock run without alerting the trial court, yet deny collateral review to a federal prisoner similarly situated." Id. at 354.

The Ninth Circuit does not administer procedural rules with the impartiality and comity required by this Court. In habeas corpus actions brought by federal prisoners, where its

own judgments are at stake, the Ninth Circuit takes a hard line:

> Section 2255 is not designed to provide criminal defendants repeated opportunities to overturn their convictions on grounds which could have been raised on direct appeal. The Supreme Court has held that where a criminal defendant fails to make allegations of error at trial or on direct appeal he must demonstrate [cause and actual prejudice].

United States v. Dunham, 767 F.2d 1395, 1396 (9th Cir. 1985), citing United States v. Frady, 456 U.S. 152, 168 (1982), and Davis v. United States, 411 U.S. 233, 236-45 (1973); see also United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993) (once defendant's chance to appeal has been waived or exhausted, it is presumed he stands fairly and finally convicted, especially when he already has had a fair opportunity to present his federal claims to a federal forum); Abatino v. United States, 750 F.2d 1442, 1445 (9th Cir. 1984) (where petitioners failed to object at trial and failed to raise of-record issue on direct appeal, they committed a double procedural default).

When it comes to California's parallel procedural rules, however, the Ninth Circuit's hard line is applied against the state courts themselves, not against the defaulting prisoners. This, too, offends comity, and warrants review on certiorari.

CONCLUSION

WHEREFORE, we respectfully request that this Court (1) grant the petition for a writ of certiorari in Park and reverse the decision of the Ninth Circuit therein; (2) grant our petition for certiorari in this case, and remand to the Ninth Circuit for reconsideration in light of this Court's decision in Park.

Dated: June 30, 2000

Respectfully submitted,

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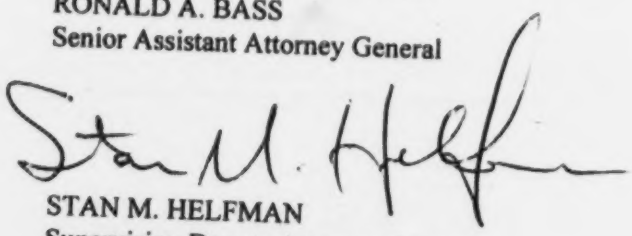

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No. 98-15730

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF CALIFORNIA; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

DONALD WASHINGTON, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No. 98-15730

THE PEOPLE OF THE STATE OF CALIFORNIA; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

DONALD WASHINGTON, JR., *Respondent.*

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WASHINGTON, JR., Petitioner-Appellant, v.	No. 98-15730 DC No. CV-97-02316-CRB
STEVE CAMBRA, Respondent-Appellee.	OPINION

---/

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
June 14, 1999--San Francisco, California

Filed April 14, 2000

Before: Mary M. Schroeder, Betty B. Fletcher, and Robert Boochever, Circuit Judges.

Opinion by Judge B. Fletcher

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that on federal habeas corpus, review is not precluded by procedural default in asserting state-court remedies when the underlying state rule necessarily requires the state appellate court to address fundamental constitutional claims.

Following California convictions, appellant Donald Washington sought habeas corpus relief in the California Supreme Court. He alleged that his right to a fair trial was violated when the trial court allowed his jury to see him in court restrained by manacles, and the State improperly relied on his post-*Miranda* silence as evidence of his sanity.

Citing two of its own precedents (*Swain* and *Dixon*), the California Supreme Court summarily denied Washington's petition.

Swain held that a state habeas petitioner who belatedly presents a collateral attack must explain the delay in raising the issue. In *Dixon*, the California Supreme Court held that in the absence of special circumstances constituting an excuse for failing to employ direct review, habeas corpus is unavailable when the claimed errors could have been raised in a timely appeal.

Washington filed a federal habeas corpus petition raising the same claims he asserted in his state habeas petition. The district court granted the State's motion to dismiss under the procedural default rules of *Swain* and *Dixon*.

The court of appeals granted a certificate of appealability on the issue of whether *Swain* and *Dixon* were regularly applied by the California Supreme Court in 1994, when Washington made his direct appeal to the California Court of Appeal.

[1] Because Washington's federal habeas petition raised the same claims as his state petition, he procedurally defaulted on those claims only if *Swain* and *Dixon* provided adequate and independent state grounds for the California Supreme Court's decision. The court of appeals could reverse the dismissal if either the *Swain* and *Dixon* procedural bars was not adequate and independent. This was so because California invoked both rules without specifying which applied to which of Washington's two claims.

[2] The *Dixon* rule does not provide an independent statelaw basis for denying a habeas petition that raises fundamental constitutional errors. For a state procedural rule to be independent, the state-law ground for decision must not be interwoven with federal law. Because a fundamental constitutional error qualified as an exception to both the *Swain* and *Dixon* rules under state law, the California Supreme Court necessarily addressed fundamental constitutional claims when applying the *Dixon* rule. Thus, the *Dixon* rule was not independent of federal law, and does not preclude federal habeas review when the petitioner asserts the denial of a federal constitutional right.

[3] Both of Washington's claims involved allegations of constitutional error. He therefore could not be held to have procedurally defaulted under *Dixon*.

COUNSEL

John J. Jordan, San Francisco, California, for the petitioner-appellant.

Christopher W. Grove, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

OPINION

B. FLETCHER, Circuit Judge:

Petitioner Donald Washington appeals from the district court's dismissal of his federal habeas petition on grounds of procedural default. We granted a certificate of appealability on the question whether, in 1994, the California Supreme Court regularly and consistently applied the procedural bar rules established in *In re Swain*, (Cal. 1953). After the parties submitted their briefs in this case, the Ninth Circuit decided *Park v. California*, No. 96-56750, __ F.3d __, 2000 WL 44133 (9th Cir. Jan. 21, 2000), holding that *Dixon* did not provide an independent state law basis for denying federal constitutional claims. We have jurisdiction pursuant to 28 U.S.C. § 2253(c). Following *Park*, we reverse the district court's dismissal of Washington's federal habeas petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

Following a jury trial, Washington was convicted of battery on a correctional officer, resisting arrest, ad assault by force likely to produce great bodily injury. Washington filed a direct appeal with the California Court of Appeal, raising issues related to his sentencing and his request for substitute counsel. On August 19, 1994, the California Court of Appeal affirmed

Washington's conviction but remanded the case for re-sentencing.

Washington did not pursue a direct appeal to the California Supreme Court. He did, however, file a pro se petition seeking a writ of habeas corpus. The petition in that court made two claims: (1) that his right to a fair trial was violated when the jury saw him in court in waist chains, manacles, and leg irons; and (2) that the government improperly used his post-*Miranda* silence as evidence of his sanity. On May 28, 1997, the California Supreme Court denied Washington's petition in a two-line disposition: "Petition for writ of habeas corpus DENIED. (*In re Swain* (1949) 34 Cal.2d 300, 204; *In re Dixon* (1953) 41 Cal.2d 756, 759)."

Shortly thereafter, Washington filed a pro se habeas petition in federal district court asserting the same claims he made in the state petition. The state moved to dismiss under *Swain* and *Dixon* on grounds of procedural default. The district court granted the motion and we subsequently granted a certificate of appealability on the question whether *Swain* and *Dixon* were regularly and consistently applied by the California Supreme Court in 1994, the year Washington made his direct appeal tot he California Court of Appeal.

II. STANDARD OF REVIEW

We review de novo a district court's dismissal of a petition for writ of habeas corpus on grounds of state procedural default. *See Fields v. Calderon*, 125 F.3d 757, 759-60 (9th Cir. 1997), *cert. denied*, 523 U.S. 1132 (1998).

III. DISCUSSION

In *Swain*, the California Supreme Court held that a state habeas petitioner who "belatedly presents a collateral attack . . . [must] explain the delay in raising the question." 209 P.2d at 795. The *Swain* rule is commonly referred to as the "untimeliness" bar. *See In re Robbins*, 959 P.2d 311, 340 n.34

(Cal. 1998). In *Dixon*, the California Supreme Court held that "in the absence of special circumstances constituting an excuse for failure to employ [the] remedy of [of direct review], the writ will not lie where the claims errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." 264 P.2d at 514. The *Dixon* and *Swain* rules are "separate and distinct" procedural bars. *Park*, 200 WL 44133, at *5 n.3.

[1] Because Washington's federal habeas petition raises the same claims as his state petition, he has procedurally defaulted on those claims only if *Swain* and *Dixon* "provide[] adequate and independent state grounds for the California Supreme Court's decision." *Fields*, 125 F.3d at 760. In examining the *Swain* and *Dixon* procedural bars, we may reverse the dismissal if either rule is not adequate and independent. This is so because the California Supreme Court invoked both rules without specifying which rule applied to which of Washington's two claims. *See Calderon v. Bean*, 96 F.3d 1126, 1131 (9th Cir. 1996) (state procedural default no bar to federal review where state court's order did not specify which rule applied to which claims); *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996) ("[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review") (citing *Siripongs v. Calderon*, 35 F.3d 1308, 1317-18 (9th Cir. 1994)).

[2] In *Park*, we held that the *Dixon* rule does not provide an "independent" state law basis for denying a habeas petition (filed before *In re Robbins*) which raises fundamental constitutional errors. We reasoned that "[f]or a state procedural rule to be `independent,' the state law ground for decision must be `interwoven with the federal law.'" 2000 WL 44133, at *6 (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), and citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)). Because a "fundamental constitutional error" qualified as an exception to

both the *Dixon* and *Swain* rules under state law,[1] we concluded that the California Supreme Court "necessarily addressed fundamental constitutional claims when applying the *Dixon* rule." *Id.* at *6. Thus the *Dixon* rule is not independent of federal law and does not preclude federal habeas review where the petitioner asserts the denial of a federal constitutional right. *Id.* at *6-7. This is so regardless of the answer to the question we certified here (whether the *Dixon* rule was regularly and consistently applied in 1994).

[3] Both of Washington's claims involve allegations of constitutional error. First Washington contends that his rights to due process and a fair trial were violated when the jury was allowed to see him in waist chains, manacles, and leg irons. *See Spain v. Rushen*, 883 F.2d 712, 716 (9th Cir. 1989) ("Generally, a criminal defendant has a constitutional right to appeal before a jury free of shackles."); *see also Illinois v. Allen*, 297 U.S. 337, 344 (1970) (shackles may be used only as a "last resort"). Second, Washington contends that the prosecutor violated his due process rights by referring to his post-*Miranda* silence as evidence of his sanity. *See Wainright v. Greenfield*, 474 U.S. 284 (1986); *cf. People of Guam v. A.C. Cruz*, 70 F.3d 1090, 1092-93 (9th Cir. 1995). Therefore, he cannot be held to have procedurally defaulted under *Dixon*.

REVERSED AND REMANDED.

---

1. *See Park*, 2000 WL 44133, at *5 and n.3 (noting similarity of exceptions to the *Swain* and *Dixon* rules set forth in *In re Clark*, 855 P.2d 729 (Cal. 1993), and *In re Harris*, 855 P.2d 391 (Cal. 1993)).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed March 16, 1998]

DONALD WASHINGTON, JR., Petitioner,	) No. C 97-2316 CRB (PR)
vs.	)
STEVEN CAMBRA, JR., Warden Respondent.	) ORDER GRANTING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, a state prisoner currently incarcerated at Pelican Bay State Prison in Crescent City, California, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, the petition is dismissed.

BACKGROUND

Petitioner was convicted by a jury in Del Norte County Superior Court of battery by an inmate on a correctional officer, resisting arrest and assault likely to produce great bodily injury. The jury also found true two prior serious felony convictions. On or about June 13, 1993, he was sentenced to a term of four years to be served consecutively with the sentence he already was serving in state prison. Petitioner appealed his conviction and sentence to the California Court of Appeal, which affirmed the judgment of conviction and remanded the matter for resentencing. See People v. Washington, 27

Cal.App.4th 940 (1994). Petitioner did not seek review from the Supreme Court of California.

Petitioner sought collateral relief from the California state courts several years later. On May 28, 1997, the Supreme Court of California summarily denied a petition raising the same claims raised herein. Petitioner filed the instant federal petition shortly thereafter.

Per order filed on August 8, 1997, the court found that the petition, liberally construed, stated two cognizable claims under § 2254 and ordered respondent to show cause why a writ of habeas corpus should not be granted. Respondent instead moves for dismissal of the petition on the ground that the claims are procedurally defaulted.

DISCUSSION

The procedural default doctrine forecloses federal review of a state prisoner's federal habeas claims if those claims were defaulted on in state court pursuant to an independent and adequate state procedural rule. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). To find procedural default, a federal court must determine that the state court explicitly invoked a state procedural bar as an independent bar as an independent basis for its decision, see id. at 735; McKenna v. McDaniel, 65 F.3d 1483, 1488 (9th Cir. 1995), and that the state procedural bar cited was clear, consistently applied and well-established at the time of the petitioner's purported default, see Calderon v. United States Dist. Court (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996), cert. denied, 117 S.Ct. 1569 (1997).

Petitioner first presented his federal claims to the Supreme Court of California in a petition for a writ of habeas corpus filed on March 31, 1997, nearly three years after his direct appeal became final. The petition was denied on May 28

1997 in an order citing In re Swain, 34 Cal.2d 300, 304 (1949), and In re Dixon, 41 Cal.2d 756, 759 (1953).[1]/

In re Swain articulates the procedural requirements that a California habeas petitioner allege with particularity the facts supporting his claims and explain and justify any delay in the presentation of the claims. See 34 Cal.2d at 304. The court has reviewed the petition that petitioner submitted to the Supreme Court of California and finds that he presented his claims with sufficient particularity;[2]/ however, the denial of the petition with a citation to In re Swain still constitutes an independent state procedural denial for untimeliness. See Allard v. Olivarez, No. C 97-1009 FMS (PR), 1998 WL 19468, at *2 (N.D. Cal. Jan. 12, 1998) (denial under In re Swain where claims presented with particularity is independent denial for untimeliness); LaFlamme v. White, No. C 96-1696 VRW, 1997 WL 488358, at *1 (N.D. Cal. Aug. 13, 1997) (same).

The Supreme Court of California also cited In re Dixon in support of its denial of the petition. In re Dixon stands for the state rule that habeas corpus "cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." 41 Cal.2d at 759. The citation to In re Dixon constitutes an additional independent state ground sufficient to bar federal review. See Odle v. Calderon, 884 F. Supp. 1404,

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1. The May 28, 1997 order states: "Petition for writ of habeas corpus is DENIED. (See In re Swain (1949) 34 Cal.2d 300, 304; In re Dixon (1953) 41 Cal.2d 756, 759.)."

2. See Kim v. Villalobos, 799 F.2d 1317, 1320 (9th Cir. 1986) (federal court may independently exaine petition presented to state court to determine whether claims were faily presented and properly exhausted).

1413 (N.D. Cala. 1995) (denial of petition with citation to In re Dixon constitutes denial on independent state ground).

Whether the state procedural bars cited were consistently applied and well-established at the time of petitioner's purported default is not as clear, however. The Supreme Court of California noted in July 1993 that "the application of its rules governing habeas petitions had become irregular and inconsistent." See Fields v. Calderon, 125 F.3d 757, 763 (9th Cir. 1997) (citing In re Clark, 5 Cal.4th 750, 763 (1993)); (citing In re Harris, 5 Cal.4th 813 (1993) (accompanying opinion to In re Clark). Procedural defaults that occurred before In re Clark and In re Harris therefore generally have been found inadequate. See, e.g., Fields, 125 F.3d at 761-65; Bean, 96 F.3d at 1129-31; Morales v. Calderon, 85 F.3d 1387, 1390-93 (9th Cir.), cert. denied, 117 S.Ct. 500 (1996); Siripongs v. Calderon, 35 F.3d 1308, 1318, 1318 (9th Cir. 1994); cert. denied, 115 S.Ct. 1175 (1995); Odle, 884 F. Supp. at 1413-14.

In re Clark and In re Harris intended to reestablish California's procedural rules governing state habeas petitions and clearly define and limit the applicable exceptions. See Fields, 125 F.3d at 763-64. Procedural defaults that occurred after In re Clark and In re Harris, as is the case here, therefore may be adequate to bar federal review. See Siripongs, 35 F.3d at 1318.[3]/ Respondent in fact submits that since In re Clark and In re Harris the state's procedural rules at issue here have been regularly and consistently applied. In support, he noted that the one published opinion to examine the adequacy

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3. The proper date for determining whether a procedural rule was firmly established and regularly followed is the time of the purported default or, stated differently, the time the claim should have been raised. Here, that time is when petitioner's direct appeal became final in 1994. See Fields, 125 F.3d at 760-61.

of California's bars after In re Clark and In re Harris concluded that they have been applied regularly and consistently. See Deere v. Calderon, 890 F. Supp. 893, 899-901 (C.D. Cal. 1995). Petitioner submits no evidence to the contrary.

In re Clark and In re Harris put petitioners on notice that previously established state procedural rules and standards would be followed regularly and consistently in the future. Deere accordingly examined the practices of the Supreme Court of California since In re Clark and In re Harris, and concluded that the court indeed had applied its timeliness bar regularly and consistently. See Deere, 890 F. Supp. at 899-901, 905-08. It also concluded that this justified honoring other bars such as that of In re Dixon. See id. at 901. Although Deere examined a relatively small number of state capital habeas petitions, its findings suggest that the Supreme Court of California has made good on its promise to apply its bars regularly and consistently to all state habeas petitions. In view of Deere and the lack of any evidence to the contrary, the court finds that the bars invoked by the Supreme Court of California here were consistently applied and well-established at the time of petitioner's purported default and therefore constitute adequate and independent state procedural rules barring review of petitioner's federal claims. See Wood v. Hall, 130 F.3d 373, 376-78 (9th Cir. 1997) (honoring Oregon fugitive disentitlement rule because petitioner did not present sufficient evidence that application of rule was unprincipled, arbitrary or standardless); Forrest v. Vasquez, 75 F.3d 562, 564 (9th Cir. 1996) (honoring California's rule barring untimely petitions for review to Supreme Court of California because "[t]here is nothing to indicate that [it] is not firmly established and consistently applied").[4]

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4. Accord Allard, 1998 WL 19468, at **2-3 (finding timeliness bar was adequate in 1994 in view of Deere and lack of any evidence to the contrary).

Petitioner's procedural default may be excused if he can demonstrate: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law, or (2) that failure to consider his claims will result in a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). Petitioner does not attempt to make any such showing, however.[5]/

CONCLUSION

For the foregoing reasons, petitioner's claims are procedurally defaulted and respondent's motion to dismiss the petition is GRANTED.

SO ORDERED.

DATED: 3-16-98

CHARLES R. BREYER
United States District Judge

5. Nor is there any indication in the record that he could make such a showing.

APPENDIX C

S060085

IN THE SUPREME COURT OF CALIFORNIA

[Filed May 28, 1997]

IN RE DONALD WASHINGTON

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED. (*In re Swain* (1949) 34 Cal.2d 300, 204, *In re Dixon* (1953) 41 Cal.2d 756, 759.)

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Chief Justice

APPENDIX D

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

[Filed Aug 19, 1994]

THE PEOPLE,

Plaintiff and Respondent,

v.

A062150
(Del Norte County
Super. Ct. No. 92-342-X)

DONALD WASHINGTON,

Defendant and Appellant./

Donald Washington, an inmate at Pelican Bay State Prison, appeals from his convictions of battery by an inmate on a non-inmate (Pen. Code, § 4501.5), resisting arrest (Pen. Code, § 148) and assault likely to produce great bodily injury (Pen. Code, § 245). Washington contends (1) that he was deprived of his right to a Marsden hearing (People v. Marsden (1970) 2 Cal.3d 118), and (2) that the court committed sentencing error. We will affirm Washington's conviction, but will remand the matter to the superior court for re-sentencing.

The charges against Washington arose from an alleged attack by him on Correctional Officer Michael Randolph. It was further alleged that Washington previously had been convicted of two serious felonies: murder and assault by an inmate on a non-inmate. Washington entered pleas of not guilty and not guilty by reason of insanity. His trial was trifurcated. Following the first phase, the jury determined that

Washington had in fact committed the charged offenses. Following the second phase, the jury returned a verdict that Washington was sane at the time he committed the offenses. At the third and final phase, the jury returned a verdict finding the enhancing allegations to be true. Washington moved for a new trial. The trial judge, Judge Nelson, however, was not available at the time of the hearing on Washington's motion; a second judge, accordingly, presided at the hearing. As relevant to the issues raised here, Washington, expressing anger that the trial judge was not present, also claimed that he was dismissing his attorney.[1]/

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1. A transcript of the hearing discloses the following:

"THE COURT: Case 92-342-X--

"DEFENDANT WASHINGTON: You want the judge of record? The judge was George L. Nelson. You wasn't the judge of record.

"THE COURT: Okay. We'll call the People of the State of California vs. Donald Washington. Mr. Washington is here with his attorney, Mr. Levy.

"DEFENDANT WASHINGTON: He ain't my attorney. I'm dismissing him right now.

"THE COURT: This matter is on for a motion for a new trial, which should probably be heard by the trial judge, who was Judge Weir.

"DEFENDANT WASHINGTON: No, Judge Weir wasn't the judge.

"THE COURT: Excuse me. It's much preferred if the matter be heard by the trial judge. But your position on that, Mr. Levy?

"DEFENDANT WASHINGTON: I'm

The court put the matter over for a day to determine the schedule of Judge Nelson. The following day, the court suggested that the matter be continued for approximately two weeks until Judge Nelson returned. The court and parties discussed a number of issues, including Washington's competence, and what his attorney viewed as an attempt by Washington to make a Marsden motion. The court, among other things, concluded that Washington wanted to make a Marsden motion but ultimately rules that all matters should be deferred until the return of Judge Nelson.[2], [3]

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dismissing all this shit today. I'm going pro per. Here you go, right here. That's my motion right here." (Emphasis added.)

2. A transcript of this hearing discloses the following: "THE COURT: So my judgement of wisdom this afternoon, that I'm going to defer all matters to Judge Nelson, now that we know that he will be here on the 4th. Now, this motion has been filed. I'm comfortable with the thought that given yesterday's requests, which included the specific request that Judge Nelson to be the one to dear with things, and the filing of this motion, that the sentence time table is interrupted. And so--I don't now see the minutes yet from yesterday. But I fully do intend to recognize the Marsden Motion. I want the record to reflect that so it will be dealt with by Judge Nelson." (Emphasis added.)

3. We accept the court's conclusion that Washington in fact was attempting to make a Marsden motion, rather than requesting that he be permitted to represent himself under Faretta v. California (1975) 422 U.S. 806. A Faretta motion would have been untimely, although the court in its discretion nonetheless might have entertained it. (People v. Windham (1977) 19 Cal.3d 121, 128.) If the motion were deemed a Faretta motion, our review of it would be limited to

Judge Nelson, however, did not deal with the Marsden motion. Indeed, it appears that Judge Nelson was not aware that such a motion might be pending; believing, rather, that it either had been dropped or had been resolved in his absence. Thus, at the hearing on Washington's motion for a new trial, defense counsel told the judge that at the previous hearings "there was an outburst from Mr. Washington. I believe he was attempting to make a Marsden Motion and also served some papers on the court regarding his own pro per motion." Counsel cited those facts not in order to obtain a Marsden hearing, but in support of his request for further competency proceedings be initiated. The court denied the motion for new trial and motion to commence competency proceedings. Neither Washington, nor his attorney, nor any other person, indicated that Washington still wished to dismiss his attorney.

Discussion

The Attorney General argues that the failure of either defense counsel or Washington himself to renew the matter before Judge Nelson should be taken as a waiver of any right to a Marsden hearing. The record does not indicate both that Washington's dissatisfaction with his attorney was transitory, and that Washington was and is quite capable of manipulating the situation so as to provide grounds for a later claim of error.[4/] Concluding that any error was harmless in all

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determining whether the error was harmless under People v. Watson (1956) 45 Cal.2d 818, 836. (People v. Rivers (1993) 20 Cal.App.4th 1040, 1050.) On this record, any error was patently harmless.

4. In denying Washington's motin to commence additional competency proceedings the trial judge stated: "It's the Court's opinion that Mr. Washington is well aware of the

events, we need not here determine whether the duty of the trial court to consider a Marsden motion exists even where the court is unaware that such a motion is pending, or whether a defendant who has once raised the matter waives any error by failing to raise it again before a different judge.

Marsden does not establish a rule of per se reversible error. (People v. Chavez (1980) 26 Cal.3d 334, 348-349.) Washington had made no showing here either that his Marsden motion would have been granted had it been heard, or that a more favorable result would have been achieved had the motion in fact been granted. The failure to rule on the motion did not affect Washington's trial in any way. The motion was made only after he had been convicted. The basis for such a motion at such a time could have been only that his attorney had acted incompetently at trial or in filing the motion for new trial (see, generally, People v. Smith (1993) 6 Cal.4th 684, 693) or, possibly, that Washington believed that counsel would be unable to represent him properly at sentencing. The fact that no Marsden motion was entertained does not preclude Washington from attacking the competency of his attorney. Indeed, we have reviewed counsel's actions under the standards stated in People v. Babbitt (1988) 45 Cal.3d 660, 707, and conclude that no grounds for claiming ineffective assistance of counsel exist. Washington was ably represented and the evidence against him was nothing less than overwhelming. We cannot see how the appointment of a different attorney would have gained Washington a new trial, or could have had any effect on the sentence imposed, and we, of course, are able to review

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proceedings that are going on before the Court, I have observed his behavior, is quite rational, quite observant, and is quite well aware of what's going on. He is also very manipulative and has learned how to manipulate people who are in charge of him, including the court, and that these actions are the result of that desire to manipulate."

Washington's claims that the sentence imposed was improper. We therefore conclude that the failure to consider the purported Marsden motion has not deprived Washington of any arguments or otherwise irrevocably affected the verdict or sentence. Under the circumstances, and on the record before us, we cannot see that Washington would have obtained a result more favorable to him had the motion been entertained.

Sentencing Error

This was Washington's second conviction of battery by an inmate upon a non-inmate, an offense punishable by a term of two, three, or four years. (Pen. Code, § 4501.5.) He had been convicted of the same offense in 1986 and, at that time, had been sentenced to a term of two years, to be served consecutively to the sentence he was then serving. The court here sentenced Washington to another consecutive term of four years. The Third Division of this court, in People v. Venegas (1994) 25 Cal.App.4th 1731, 1742-1744, recently held that such a sentence violates Penal Code section 1170.1, subdivisions (a) and (c), providing as relevant, that where the sentences for "new offenses" are to be served consecutively, the greatest term of imprisonment will be selected as the principal term, the other or others will be the subordinate term or terms, and such subordinate term or terms shall consist of one-third of the statutory middle term.[5/] For the reasons stated by the Third Division, the sentence imposed here was error. The superior court should have designated the sentence on the current offense as the principal term, and reimposed the 1986 sentence as a subordinate term of one-third the midterm.

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5. In People v. Perez (Sept. 3, 1993) A057239, decided by this division, we essentially adopted the same analysis used by the Third Division in Venegas. Review in that case was dismissed on May 12, 1994.

The judgment is affirmed. The matter is remanded to the superior court for re-sentencing in accordance with our opinion. The superior court further is ordered to forward a corrected abstract of judgment to the Department of Corrections.

CERTIFIED FOR PUBLICATION.

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Stein, J.

WE CONCUR:

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Newsom, Acting P.J.

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Dossee, J.

(P. v. Washington - A062150)